

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

GEORGE ASSAD, Derivatively on
Behalf of PICO HOLDINGS, INC.

Plaintiff,

vs.

JOHN R. HART; RONALD LANGLEY;
ROBERT G. DEUSTER; RICHARD D.
RUPPERT; JULIE H. SULLIVAN;
KRISTINA M. LESLIE; CARLOS C.
CAMPBELL; KENNETH J. SLEPICKA;
DOES 1-12, inclusive,

Defendants,

- and -

PICO HOLDINGS, INC.,

Nominal Party.

CASE NO. 11cv2269 WQH (BGS)

ORDER

HAYES, Judge:

The matters before the Court are the Motion to Dismiss filed by Defendants John R. Hart, Ronald Langley, Ronald G. Deuster, Richard D. Ruppert, Julie H. Sullivan, Kristina M. Leslie, Carlos C. Campbell, and Kenneth J. Slepicka (ECF No. 6) and the Motion to Remand to State Court filed by Plaintiff George Assad, suing derivatively on behalf of PICO Holding, Inc. (ECF No. 7).

1 **I. Background**

2 On August 26, 2011, Plaintiff Assad initiated this shareholder derivative action by filing
3 a Complaint in the Superior Court of the State of California for the County of San Diego,
4 where it was assigned case number 37-2011-00096962-CU-BT-CTL. (ECF No. 1-4 at 7). On
5 September 30, 2011, Defendants filed a Notice of Removal, removing the case to this Court.
6 (ECF No. 1). Defendants assert that the Court has original jurisdiction over the case pursuant
7 to 28 U.S.C. § 1331 because allegations regarding the negative say on pay vote in the
8 Complaint raises “a substantial and novel federal question.” *Id.* at 4.

9 On October 7, 2011, Defendants filed a Motion to Dismiss. (ECF No. 6). Plaintiff filed
10 an Opposition. (ECF No. 14). Defendants filed a Reply. (ECF No. 16).

11 On October 13, 2011, Plaintiff filed a Motion to Remand to State Court. (ECF No. 7).
12 Defendants filed an Opposition. (ECF No. 15). Plaintiff filed a Reply. (ECF No. 17).

13 **II. Allegations of the Complaint**

14 Plaintiff George Assad is a shareholder of PICO Holdings, Inc. (“PICO”). (ECF No.
15 1-1 at ¶ 18). PICO is a California corporation located in La Jolla, CA. *Id.* at ¶ 19. PICO
16 “engages in water resource and water storage, real estate insurance, and agribusiness
17 businesses.” *Id.* at ¶ 36. Defendants Hart, Langley, Deuster, Ruppert, Sullivan, Leslie,
18 Campbell, and Slepicka serve on the board of directors for PICO. *Id.* at ¶¶ 20-27.

19 PICO maintains a “pay-for-performance” policy that “rewards executive[s] for
20 achieving a superior return” *Id.* at ¶ 5. On April 2, 2011, PICO filed a proxy statement in
21 which the board “represented that the intent of its compensation policy was to align
22 shareholder and executive interests.” *Id.* In 2010, PICO’s stock performance “lagged the Dow
23 by nearly 14%” and the amount of free cash flow per share decreased. *Id.* at ¶ 7. “In direct
24 violation of their publicly stated pay for performance policy,” the board increased executive
25 salaries from \$2.4 million in 2009 to nearly \$14.3 million in 2010. *Id.* “This was pay for
26 under performance, in direct violation of the board’s purported pay for performance policy and
27 its own public statements” *Id.* “The directors on the board breached their fiduciary duties
28 by materially increasing 2010 executive compensation in the wake of substantial diminution

1 in shareholder value after claiming to adhere to a strict pay-for-performance policy, which
2 purportedly hinged upon delivering ‘superior return’ to shareholders” *Id.* at ¶ 54.

3 On May 13, 2011, sixty-one percent of shareholders “rejected the Board’s senior officer
4 compensation recommendation” in a “say on pay” vote conducted pursuant to the provisions
5 of Dodd-Frank Wall Street Reform Act. *Id.* at ¶¶ 10, 12. “The inference that the board
6 breached its fiduciary duties is supported by the fact that: (a) a majority of the company’s
7 stockholders voted that 2010 executive compensation was not in their best interests; and (b)
8 the board has yet to respond to the majority will of its stockholders” *Id.* at ¶¶ 12, 54.

9 Plaintiff asserts four claims against Defendants as follows: (1) breach of fiduciary duty
10 in connection with the issuance of false and misleading statements; (2) breach of fiduciary duty
11 in connection with the board’s compensation practices; (3) breach of the fiduciary duty in
12 connection with the failure to respond to the negative say on pay vote; and (4) unjust
13 enrichment.

14 Plaintiff’s first claim for breach of fiduciary duty in connection with the issuance of
15 false and misleading statements alleges that Defendants “breached their fiduciary duties of
16 loyalty, good faith, candor and independence owed to PICO and its shareholders, and failed
17 to disclose material information and/or made material misrepresentations... regarding PICO’s
18 2010 executive compensation scheme.” *Id.* at ¶ 75. Defendants “conceal[ed] the fact that the
19 company was overpaying its directors, officers and employees via compensation plans
20 premised on an illusory ‘pay for performance’ executive compensation scheme” *Id.* at ¶
21 79.

22 Plaintiff’s second claim for breach of fiduciary duty in connection with the board’s
23 compensation practices alleges that Defendants “breached their fiduciary duties ... by failing
24 to adhere to the Company’s purported pay-for-performance policy.” *Id.* at ¶ 85. The policy
25 was to “‘reward executive[s] for achieving a superior return’ for stockholders and to align
26 shareholder and executive interests[;]” however, the board increased executive compensation
27 as the company’s stock value decreased. *Id.*

28 Plaintiff’s third claim for breach of the fiduciary duty in connection with the failure to

1 respond to the negative say on pay vote alleges that Defendants breached their fiduciary duties
 2 “by failing to amend or alter 2010 executive compensation (or even issue a response) in
 3 connection with the negative say on pay vote.” *Id.* at ¶ 92. “[D]espite having their executive
 4 compensation program rejected by 61% of voting shareholders the board has done nothing in
 5 response, in direct violation of their fiduciary duties.” *Id.*

6 Plaintiff’s fourth claim for unjust enrichment alleges that Defendants “will be and have
 7 been unjustly enriched... in the form of unjustified salaries, benefits, and stock option grants.”
 8 *Id.* at ¶ 98.

9 **III. Discussion**

10 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a claim
 11 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil Procedure
 12 8(a) provides: “A pleading that states a claim for relief must contain ... a short and plain
 13 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
 14 Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal
 15 theory or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police*
 16 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

17 To sufficiently state a claim to relief and survive a Rule 12(b)(6) motion, a complaint
 18 “does not need detailed factual allegations” but the “[f]actual allegations must be enough to
 19 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 20 555 (2007). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
 21 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
 22 of action will not do.” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). When considering a motion to
 23 dismiss, a court must accept as true all “well-pleaded factual allegations.” *Ashcroft v. Iqbal*,
 24 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009). However, a court is not “required to accept as
 25 true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
 26 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see, e.g.,*
 27 *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) (“Plaintiffs’ general
 28 statement that Wal-Mart exercised control over their day-to-day employment is a conclusion,

1 not a factual allegation stated with any specificity. We need not accept Plaintiffs' unwarranted
 2 conclusion in reviewing a motion to dismiss."). "In sum, for a complaint to survive a motion
 3 to dismiss, the non-conclusory factual content, and reasonable inferences from that content,
 4 must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret*
 5 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

6 As discussed above, Plaintiff asserts a claim for "breach of the fiduciary duty in
 7 connection with the failure to respond to the negative say on pay vote." (ECF No. 1-1 at 26).
 8 Plaintiff alleges that Defendants breached their fiduciary duties "by failing to amend or alter
 9 2010 executive compensation (or even issue a response) in connection with the negative say
 10 on pay vote." *Id.* at ¶ 92. "[D]espite having their executive compensation program rejected
 11 by 61% of voting shareholders the board has done nothing in response, *in direct violation of*
 12 *their fiduciary duties.*" *Id.* (emphasis added).

13 Section 951 of the Dodd-Frank Wall Street Reform Act provides:

14 The shareholder vote referred to in subsections (a) and (b) [outlining the
 15 requirements of the say on pay vote] shall not be binding on the issuer or the
 16 board of directors of an issuer, and may not be construed— (1) as overruling a
 17 decision by such issuer or board of directors; (2) to create or imply any change
 18 to the fiduciary duties of such issuer or board of directors; (3) to create or imply
 19 any additional fiduciary duties for such issuer or board of directors; or (4) to
 20 restrict or limit the ability of shareholders to make proposals for inclusion in
 21 proxy materials related to executive compensation.

22 15 U.S.C. § 78n-1(c). "[A] court may not infer a private right of action from a federal statute
 23 unless Congress has displayed 'an intent to create not just a private right of action but also a
 24 private remedy.'" *Potter v. Hughes*, 546 F.3d 1051, 1064 (9th Cir. 2008) (citing *Alexander v.*
 25 *Sandoval*, 532 U.S. 275, 286-89 (2001)).

26 The language of the statute expressly states that it "may *not* be construed ... to create
 27 or imply any *change* to fiduciary duties" nor does it "*create or imply* any additional fiduciary
 28 duties." *See* 15 U.S.C. § 78n-1(c) (emphasis added). The Dodd-Frank Wall Street Reform Act
 did not create a private right of action or create new fiduciary duties. The Court concludes that
 Plaintiff has failed to state a claim for breach of fiduciary duty based on the failure to respond
 to the negative say on pay vote pursuant to 15 U.S.C. § 78n-1. The motion to dismiss

1 Plaintiff's third claim is GRANTED.¹

2 The federal supplemental jurisdiction statute provides: "[I]n any civil action of which
3 the district courts have original jurisdiction, the district courts shall have supplemental
4 jurisdiction over all other claims that are so related to claims in the action within such original
5 jurisdiction that they form part of the same case or controversy under Article III of the United
6 States Constitution." 28 U.S.C. §1367(a). A district court may decline to exercise
7 supplemental jurisdiction over a state law claim if:

8 (1) the claim raises a novel or complex issue of State law,

9 (2) the claim substantially predominates over the claim or claims over which the
10 district court has original jurisdiction,

11 (3) the district court has dismissed all claims over which it has original
jurisdiction, or

12 (4) in exceptional circumstances, there are other compelling reasons for
declining jurisdiction.

13 28 U.S.C. §1367(c). In this case, the Court has dismissed claim three, the only claim that
14 purports to assert a violation of a federal law. The remaining claims one, two and four assert
15 violations of state law and does not confer federal jurisdiction.

16 Defendants contend that Plaintiff's reference to the "say on pay" vote as evidence of
17 breach of fiduciary duty "requires the interpretation and application of Dodd-Frank" because
18 it "implies a change in directors' fiduciary duties with respect to compensation" (ECF No. 15
19 at 9).

20 A state law claim presents a substantial federal question if the claim "necessarily
21 raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may
22 entertain without disturbing any congressionally approved balance of federal and state judicial
23 responsibilities." *Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314
24 (2005). However, even "[t]he invocation of [a federal law] as a basis for establishing an
25 element of a state law cause of action does not confer federal question jurisdiction" where there
26 is a state law basis for the same element. *See Rains v. Criterion Sys.*, 80 F.3d 339, 345 (9th
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28 ¹ The Court does not rule on the motion to dismiss claims one, two, and four.

1 Cir. 1996). “Because each of [plaintiff’s] claims is supported by at least one state law theory
 2 of recovery... the complaint does not state a claim ‘arising under’ [the statute] for purposes of
 3 removal jurisdiction.” *Duncan v. Stuetzle*, 76 F.3d 1480, 1490 (9th Cir. 1996); *see also Rains*,
 4 80 F.3d at 346.

5 To the extent that Plaintiff seeks to use the negative say on pay vote as evidence that
 6 the business judgment presumption was rebutted, resolution of the issue depends on California
 7 state law. Federal question jurisdiction does not exist. *See Franchise Tax Bd. of State of Cal.*
 8 *v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 9 (1983) (finding
 9 that federal question jurisdiction does not exist where “the vindication of a right under state
 10 law [does not] necessarily turn on some construction of federal law.”). Accordingly, Plaintiff’s
 11 remaining claims for violation of state law do not necessarily raise a substantial issue of federal
 12 law.

13 The Court declines to exercise supplemental jurisdiction over the remaining state law
 14 claims against Defendants pursuant to 28 U.S.C. § 1367(c). *See Ove v. Gwinn*, 264 F.3d 817,
 15 826 (9th Cir. 2001) (“A court may decline to exercise supplemental jurisdiction over related
 16 state-law claims once it has dismissed all claims over which it has original jurisdiction.”). The
 17 Court declines to exercise supplemental jurisdiction over the remaining state law claims.


18 This case was removed from state court. The removal statute provides: “If at any time
 19 before final judgment it appears that the district court lacks subject matter jurisdiction, the case
 20 shall be remanded.” 28 U.S.C. § 1447(c).

21 **IV. Conclusion**

22 IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendants John R.
 23 Hart, Ronald Langley, Ronald G. Deuster, Richard D. Ruppert, Julie H. Sullivan, Kristina M.
 24 Leslie, Carlos C. Campbell, and Kenneth J. Slepicka (ECF No. 6) is GRANTED in part.
 25 Plaintiff’s third claim for “breach of fiduciary duty in connection with the failure to respond
 26 to the negative say on pay vote” is DISMISSED. The Motion to Remand to State Court filed
 27 by Plaintiff George Assad, suing derivatively on behalf of PICO Holding, Inc., (ECF No. 7)
 28 is GRANTED in part. Pursuant to 28 U.S.C. § 1447(c), this action is REMANDED to the

1 California Superior Court for the County of San Diego, where it was originally filed and
2 assigned Case No. 37-2011-00096962-CU-BT-CTL.

3 DATED: January 6, 2012

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5 **WILLIAM Q. HAYES**
6 United States District Judge
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